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Nos. 79-385 and 79-438

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN MCCARTHY, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY GALLAGHER, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a)[1] is reported at 602 F. 2d 1139. The opinion of the district court (Pet. App. 13a-20a) and the decision denying a motion for reconsideration (79-385 Pet. App.

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[1]Unless otherwise indicated all "Pet. App." references are to the petition in No. 79-438.

10a-15a) are unreported. The decision of the court of appeals on the initial appeal in this case (Pet. App. 21a-55a) is reported at 576 F. 2d 1028.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on July 23, 1979. A petition for rehearing was denied on August 17, 1979 (Pet. App. 3a). The petition for a writ of certiorari in No. 79-385 was filed on September 6, 1979. The petition for a writ of certiorari in No. 79-438 was filed on September 17, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars retrial of petitioner McCarthy following the reversal of his initial convictions for trial error and the subsequent reversal of a pretrial order dismissing the indictment for failure to charge an offense (No. 79-385).

2. Whether petitioners may be convicted of a criminal conspiracy to accomplish only one of two criminal objects listed in the conspiracy count of the indictment (No. 79-438).

STATEMENT

1. In an indictment filed in the United States District Court for the District of New Jersey, petitioners were charged with misapplication of funds of a federally insured bank, in violation of 18 U.S.C. 656, making false statements in connection with bank loan applications, in violation of 18 U.S.C. 1014, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.

The evidence at petitioners' first trial showed that petitioners Gallagher and McCarthy were unable to obtain bank loans for their business firm in 1973 because of the firm's poor financial condition. They therefore arranged to have petitioner Fredenburgh, a bank manager, approve bank loans to several individuals on the understanding that petitioner Gallagher would in fact receive the proceeds of the loans. After the loans were authorized, petitioner Fredenburgh received a percentage of the proceeds as a kickback (Pet. App. 6a, 22a-32a). The jury convicted petitioners on the conspiracy count and on various counts of misapplication of bank funds (18 U.S.C. 656).[2] Petitioners Gallagher and Fredenburgh were also convicted on two counts of making false statements in connection with bank loans (18 U.S.C. 1014).

On appeal, the court of appeals ruled that the evidence was sufficient to support the convictions for conspiracy and misapplication of bank funds (Pet. App. 33a), but the court reversed petitioners' convictions for the conspiracy and misapplication offenses because the district court failed to instruct the jury "that it must find that Fredenburgh knew that those named as debtors lacked the ability or intent to repay the loans" (*id.* at 50a; footnote omitted).[3] The case was remanded to the district court (*id.* at 55a).

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[2]Petitioner Fredenburgh was convicted on 13 counts, petitioner Gallagher on 12 counts, and petitioner McCarthy on one count of misapplication of bank funds. Petitioner McCarthy was acquitted on the remaining misapplication counts and on the false statement charges (18 U.S.C. 1014).

[3]The court affirmed petitioner Fredenburgh's convictions for making false statements (18 U.S.C. 1014) but vacated his sentences on those counts (Pet. App. 52-55a & n.17). Petitioner Fredenburgh has been resentenced on those convictions, which are not at issue in this petition (*id.* at 14a-15a).

2. On remand, the district court dismissed the indictment for failure to charge an offense (Pet. App. 13a-20a; 79-385 Pet. App. 10a-15a). The district court ruled that the conspiracy and misapplication counts of the indictment are deficient because they fail to allege that petitioner Fredenburgh was aware that the named debtors were unable or unwilling to repay the loans (Pet. App. 19a-20a). In addition, the district court expressed its belief that the evidence at the first trial was insufficient to establish Fredenburgh's knowledge of the debtor's inability or unwillingness to repay and observed that there was "no likelihood that the evidence at a new trial would be any different" (*id.* at 19a).

3. On the government's appeal, the court of appeals reversed the district court's order and remanded the case for retrial (Pet. App. 5a-11a). The court first noted that the government's appeal from the dismissal order was permissible under 18 U.S.C. 3731 (*id.* at 5a). It then concluded that the indictment, which tracks the language of the statute, sufficiently charges an offense under 18 U.S.C. 656 (*id.* at 8a-9a). Finally, the court of appeals held that, to the extent the district court's ruling was based on the alleged insufficiency of the evidence at the first trial, such a finding was both premature—because the government was free to introduce additional evidence on retrial (*id.* at 9a-10a)— and was foreclosed because the court of appeals had ruled that the evidence was sufficient on the prior appeal (*id.* at 11a).

4. We have been informed that, on remand, the district court has severed petitioner McCarthy's case from that of petitioners Gallagher and Fredenburgh. The trial of petitioners Gallagher and Fredenburgh commenced on September 18, 1979, and is currently in progress.

ARGUMENT

1. Petitioner McCarthy asserts (79-385 Pet. 6-15) that the district court's order dismissing the indictment was in reality a judgment of acquittal since, in petitioner's view, the dismissal was predicated in part on a finding that the evidence on retrial would be insufficient to convict on the misapplication and conspiracy charges. Therefore, petitioner argues, the government's appeal and any subsequent retrial are barred by the Double Jeopardy Clause. This argument is insubstantial and was correctly rejected by the court of appeals.

To begin with, petitioner concedes (79-385 Pet. 6), as he must, that he was subject to retrial following reversal of his original convictions for error in the jury instructions. See *Burks* v. *United States*, 437 U.S. 1, 15-16 (1978); *Greene* v. *Massey*, 437 U.S. 19, 25-26 (1978). Once the convictions were reversed, the case was remanded to the district court and set for retrial. Before retrial commenced, however, the district court dismissed the indictment "because the particularized charges of §656 violations fail to charge an offense" (79-385 Pet. App. 14a). The pretrial dismissal order, entered before jeopardy had attached on retrial, was appealable by the government because retrial of petitioner following reversal of the dismissal order would not subject petitioner to an impermissible second jeopardy. See *United States* v. *Sanford*, 429 U.S. 14 (1976); *Serfass* v. *United States*, 420 U.S. 377 (1975).

Petitioner contends (79-385 Pet. 11), however, that the district court's order amounted to an "acquittal" because it was based in part on a finding that the anticipated evidence on retrial would be insufficient. But exactly the

same was true in *Serfass* (except that the trial court acted before a first trial), yet the Court recognized the constitutionality of the government's appeal.

Moreover, it is axiomatic that an acquittal may be entered only after trial has commenced and evidence has been taken. Fed. R. Crim. P. 29. It makes no sense to say that the government has failed to produce sufficient evidence to sustain a conviction before the government has had an opportunity to present any of its evidence. Nor is it relevant that petitioner previously had been tried for these offenses. Petitioner McCarthy was convicted on one misapplication count and on the conspiracy count after the first trial. Thereafter, the court of appeals upheld the sufficiency of the evidence on those counts, and, so far as the record shows, petitioner never sought review of that determination. Accordingly, retrial of petitioner on those charges is permissible. See *Burks* v. *United States*, *supra*.[4]

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[4]Petitioner McCarthy also argues (79-385 Pet. 8-11, 13-15) that the district court's ruling on the sufficiency of the evidence was correct and should be reinstated. On this issue, we rely on the opinion of the court of appeals (Pet. App. 9a-11a). Moreover, under the law of the case doctrine, the district court had no authority to reassess the sufficiency of the evidence at the first trial, because the court of appeals had already reviewed the evidence and found it sufficient to support the convictions. In any event, the government is free on retrial to introduce new evidence not presented at the first trial. See *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957). *Burks* v. *United States*, 437 U.S. 1 (1978) on which petitioner relies (79-385 Pet. 11), does not support petitioner because the evidence at the first trial was insufficient in that case to sustain the conviction.

McCarthy's claim that the doctrine of collateral estoppel applies in this case was not considered by the district court in dismissing the indictment. In a separate order, however, the district court rejected petitioner's claim, and an appeal from that ruling is now pending before the Third Circuit (No. 79-2329).

2. Petitioners Gallagher and Fredenburgh contend (79-438 Pet. 5, 7-12) that they may not be convicted of conspiracy to misapply bank funds under an indictment charging them with conspiracy to misapply bank funds *and* make false statements in connection with bank loan applications.[5]

But petitioners have not yet been convicted on such a theory (see note 5, *supra*). Petitioners' original conspiracy convictions were set aside on the first appeal for error in the instructions, not for evidentiary insufficiency, and they have not yet been convicted at their ongoing retrial. It is presently premature for this Court to pass upon petitioners' speculative claim that (a) they will be convicted of conspiracy at their retrial and (b) that the government's proof will support a finding that petitioners agreed to violate only one objective of the charged conspiracy. If petitioners are acquitted at their new trial, their claim will be moot. If they are convicted on the conspiracy count, there will be time enough for the issue to be brought to this Court for further review in a

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[5]Petitioners argue that this claim arises because, on the first appeal, the court of appeals reversed the false statement convictions against petitioner Gallagher for insufficient evidence. Petitioners acknowledge that the court upheld the false statement conviction against petitioner Fredenburgh, but they reason that Fredenburgh cannot be convicted of a conspiracy to make false statements if no one else participated in that crime (Pet. 5). A reading of the opinion makes clear, however, that this reversal of Gallagher's substantive convictions under Section 1014 was not based in any way on the conclusion that Gallagher and Fredenburgh did not conspire to violate that statute, but rather on the view that the evidence would not support a finding that Gallagher committed the false statement offenses as a principal.

concrete, justiciable form. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners also argue (Pet. 2; [redacted] Pet. 12-13) that the indictment failed to state an offense under 18 U.S.C. 656. The court of appeals correctly rejected this contention, holding that the indictment, which was written in the terms of the statute, clearly charges an offense under Section 656 (Pet. App. 8a-9a). In any event, this Court should not interrupt petitioners' trial in order to undertake review of this issue. If petitioners are convicted, they may raise the issue on appeal after final judgment.

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